

2006

George B. Handy v. US Bank National Association : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GEORGE B. HANDY, Trustee,

Appellant,

vs.

U.S. BANK NATIONAL ASSOCIATION,

Appellee.

Case No. 20060529 CA

APPEAL FROM A JUDGMENT
HON. BRENT W. WEST
SECOND JUDICIAL DISTRICT COURT IN AND FOR
WEBER COUNTY, STATE OF UTAH

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STATEMENT REGARDING ISSUES PRESENTED FOR REVIEW

U. S. Bank purports to disagree with appellant's statement of issues, but does not itself set forth a statement of issues in accordance with U.R.A.P. 24 (*i.e.*, a statement of issues with standard of review and citation to the record showing preservation below). The Bank does submit as a "more accurate statement of the additional issues raised by this appeal" the following:

(1) Whether there are other grounds in the record sufficient to support the District Court's decision as a matter of law, such as Handy having failed to marshal the evidence and/or having waived the right to challenge the District Court's *Findings* that are dispositive of his claim; (2) whether, because Handy is neither the owner of the account nor a trustee, he lacks standing; and (3) whether, irrespective of any presumption of payment, Handy met his burden of proof?

(Brief of Appellee, p. 4.)

With respect to this statement, appellant notes the following:

Contrary to what was actually written in Mr. Handy's brief, the Bank characterizes Mr. Handy's arguments as "insist[ing] that this Court's review of the District Court's findings is 'de novo.'" (*Id.*) In actuality, as discussed below, Mr. Handy contends that there is no review of "findings" at all, because the trial court fundamentally misallocated the burden of proof. The Bank would like to (and frequently does) recharacterize this issue as an evidentiary challenge to the fact findings themselves, requiring Mr. Handy to marshal the evidence in support of the findings. (*Id.*, pp. 3-5, 29-31.) However, as made clear in appellant's opening brief, Mr. Handy's principal contention on appeal is that the trial court improperly shifted the burden of proof in this case on the issue of payment – ordinarily an affirmative defense on which the defendant bears the burden – to the plaintiff.

Allocation of a burden of proof is purely a question of law. *State v. Ferguson*, 2005 UT App 144, ¶ 5, 111 P.3d 820, citing *Beaver County v. Utah State Tax Comm’n*, 916 P.2d 344, 357 (Utah 1996). Improper allocation of the burden of proof is reversible error requiring remand for determination under the correct standard. *Id.*; *Searle v. Milburn Irrigation Co.*, 2006 UT 16, ¶¶ 49-52, 57, 133 P.3d 382; *Wilson v. Labor Comm’n*, 2005 UT App 462 *1 (per curiam; not reported) (improper assignment of burden of proof was “manifest error warranting summary reversal”).¹

Under these circumstances, where the basis of an appeal is not the sufficiency of evidence to sustain fact findings but the court’s erroneous application of law, there is no marshaling requirement. *Dishinger v. Potter*, 2001 UT App 209, 47 P.3d 76 (marshaling not required where appellant is challenging trial court’s application of law). Indeed, it would seem odd, if not infeasible altogether, to require an appellant to marshal evidence in support of findings that are inherently defective because they were rendered under a key misapprehension as to the parties’ burdens of proof.

That principle is especially apt in this case. Had the trial court focused on the the Bank’s evidence of payment rather than the plaintiff’s evidence of non-payment, as required under Oregon law, the court would have had to address certain aspects of the defendant’s evidence that were rendered immaterial by its application of the erroneous standard. For

¹ However, no remand on liability is necessary if, applying the correct standard, this Court concludes that the defendant’s evidence failed to rise to the level of a *prima facie* case on its affirmative defense, which is a question of law. *Bair v. Axiom Design, L.L.C.*, 2001 UT 20, ¶ 13, 20 P.3d 388. See pp. 10-14, *infra*.

example, all three of the Bank's witnesses admitted that they have no evidence of what happened to Account 403111-8. (See pp 10-12, *infra*.) Obviously, that testimony would have been highly relevant to the trial court had it examined the legal sufficiency of the defendant's evidence.

The next issue identified in the Bank's Issues Presented and Standards of Review section is "(2) whether, because Handy is neither the owner of the account nor a trustee, he lacks standing[.]" (Brief of Appellee at 3.) The record reflects, and the Bank essentially concedes, that it never raised this issue in the court below. (*Id.*, p. 32.) The Bank's failure to preserve the issue is addressed *infra* at p. 15.²

The final issue identified in the Bank's Issues Presented and Standard of Review section is "(3) whether, irrespective of any presumption of payment, Handy met his burden of proof?" Inasmuch as it would be improper to ask this Court to weigh evidence and render fact findings, Mr. Handy interprets this to be the only argument that could be made at the appellate level, *i.e.*, whether the plaintiff's evidence was sufficient to establish a *prima facie* case. That contention is addressed below at pp. 10-14.

² The Bank appears to criticize Mr. Handy for not addressing this issue in his opening brief. However, the trial court expressly did not rely upon this issue as a basis for rendering judgment. The Conclusions of Law are devoid of any mention of it, and the court stated in its Memorandum Decision that the issue was "not dispositive" of Mr. Handy's claim. (R. 253.) There is no requirement (nor would it be logical) for an appellant to address an issue that did not form the basis of the trial court's ruling, essentially arguing, "If the court had ruled this way, it would have been wrong for these reasons..."

In its Issues Presented and Standard of Review section, the Bank also contests the standards of review stated in Mr. Handy's brief. The issues identified by Mr. Handy were:

ISSUE NO. 1: Did the district court err in ruling that Oregon law would apply a "presumption of payment" to the savings account at issue?

How the Bank can claim the Court's review of this issue is anything but *de novo* is perplexing. The law is clear: Under Oregon law, the presumption of payment is a shifting of the burden of proof on the affirmative defense of payment from the defendant to the plaintiff. (See Brief of Appellant, p. 17.) The allocation of a burden of proof is a pure question of law. (See p. 2, *supra*.)

ISSUE NO. 2: In the alternative, did the district court err in ruling that, if the presumption of payment rule does apply, the plaintiff's evidence did not rebut the presumption?

The Bank argues that Mr. Handy was required to marshal the evidence on this issue as well. Were this a challenge to the sufficiency of evidence, that might well be true. But it is Mr. Handy's position that Oregon law recognizes certain facts as sufficient as a matter of law to rebut a presumption of payment. Under Oregon law, no presumption of payment *arises* if there is evidence that the passage of time would be consistent with societal expectations (unlike a typical debt in which forbearance would be the exception). (Brief of Appellant, pp. 23-24). That criterion is met with respect to a passbook savings account in which presentation of the passbook was not required for the crediting of interest. It is undisputed that long periods of dormancy were not only reasonable in such circumstance, but were expected and encouraged by banks. (*Id.*, pp. 13-15.) If no presumption of

payment arose, then obviously Mr. Handy had no duty to rebut it. Instead, the burden remained on the Bank to prove its affirmative defense of payment.

ARGUMENT

I. THE TRIAL COURT ERRED IN APPLYING THE PRESUMPTION OF PAYMENT IN THIS CASE.

The dispositive issue in this appeal is whether the trial court wrongfully shifted the burden of proof on the affirmative defense of payment from the defendant Bank to Mr. Handy. In his opening brief, Mr. Handy cited extensive authority for the proposition that, even assuming that passbook savings accounts are subject to a presumption of payment, the 20-year presumption period would not have commenced under Oregon law until the demand for payment was made (2003), because it was only at that point that a savings account debt “matures.” (See Brief of Appellant, pp. 17-18.)

The Bank addresses the presumption of payment in the last five pages of its brief (pp. 32-37). Notably, the Bank does not even mention, let alone refute, any of the Oregon or other cases cited in Mr. Handy’s brief. Nor does it acknowledge the commentators who have espoused the same position. (See Brief of Appellant, pp. 12-23.)

The Bank does cite to a single intermediate opinion from Illinois, *In re Fantozzi*, 183 Ill. App.3d 732, 539 N.E.2d 340 (1989), in which the court of appeals rejected a plaintiff’s argument that the presumption period did not begin to run until demand was made. The court cited no case law, treatise, or any other authority for that conclusion, which was based largely on the fact that the plaintiff had managed to locate two other accounts at the same

bank at the time of her husband's death. That single opinion is not sufficient to overcome overwhelming authority to the contrary.³

The Bank also contends that “not triggering the commencement of the presumption until a demand for payment has been made would defeat the purpose of this rule or doctrine of law.” (Brief of Appellee, p. 34.) This argument is ironic, because *triggering* the presumption period before a demand for payment would defeat the very purpose of savings accounts. Back in the passbook era, banks knew that customers often left money in savings accounts for many years at a time, and actively encouraged them to do so. (See Brief of Appellant, pp. 13-15.) As the Missouri Supreme Court stated, it would have been a very disturbing proposition for a bank to solicit long-term investment in a passbook account, then simply confiscate the money if the investment was long-term enough. (*Id.*, citing *Missouri Pacific R. Co. v. Continental National Bank*, 212 Mo. 505, 111 S.W. 574 (1908).) It would be especially unnerving in a case like this where the Bank (unlike others) encouraged a lack of interaction by telling customers that there was no need to present the passbook in order to receive interest. The Bank's brief does not address any of these considerations.

³ Appellant also notes a significant difference between *Fantozzi* and the present case: The defendant in *Fantozzi* produced a witness who had actually been employed at the bank in question when the deposits were made, *i.e.*, who had actual knowledge of the bank's policies and practices at that time. The Bank here did not. (See pp. 10-14, *infra*.) Additionally, as the court noted, records existed in that case showing that two other accounts in the decedent's name had been frozen at the time of his death, suggesting that another account would have been discovered at the same time. *Id.*, 539 N.E.2d at 343. Again, there is no such evidence here.

The few other cases cited by the Bank do not aid its position. The issue of when a presumption of payment arises on a passbook account was not raised, and hence was not addressed, in *Hicks v. The Exchange Bank & Trust Co.*, 478 S.W.2d 54 (Ark. 1972), or *Owens v. Bank of Brewton*, 53 Ala.App. 529, 302 So.2d 114 (1974). Nor was it raised in *Commerce Union Bank v. Horton*, 475 S.W.2d 660 (Tenn. 1972). Appellant notes, however, that *Horton* actually supports Mr. Handy's position. In applying that state's 16-year presumption of payment to a checking account, the *Horton* court expressly suggested that it would have ruled differently had the case involved a savings account. See *id.* at 684 (“[B]earing in mind the nature of a checking account, which, since it foregoes the interest usually paid on a savings deposit, carries with it the idea of current or contemporary use, we consider it most reasonable that the presumption of payment after sixteen years lapse of time should apply”).

Under Oregon law, any presumption of payment did not accrue until 2003, the date of demand. Although that issue is dispositive, Mr. Handy further submits that the presumption of payment does not apply to passbook savings accounts at all. On this point, appellant has cited the thorough analysis of the New Jersey Supreme Court in *Pagano v. United New Jersey Bank*, 670 A.2d 509 (N.J. 1995). (See Brief of Appellant, pp. 25-27.)

In response, the Bank acknowledges that *Pagano* so holds. The Bank also acknowledges that *Michie on Banks* (which the Oregon Supreme Court has cited numerous times as reliable authority on banking law) and *C.J.S.* cite *Pagano* as correctly stating the

law.⁴ The Bank points to no flaws in *Pagano*'s reasoning. Instead, the Bank cites a handful of cases in which a presumption of payment was applied, without analysis, to savings accounts. *Hicks, supra*; *Fantozzi, supra*; *Owens, supra*; *Central National Bank of McKinney v. Booher*, 557 S.W.2d 563 (Tex. App. 1977). The fact that the issue was neither raised nor addressed in those cases limits their usefulness.

The Bank next claims that "Handy also argues that the presumption of payment rule is no longer consistent with Oregon law" Presumably, the Bank is referring to a notation by the Oregon Supreme Court that the presumption of payment is of decreasing vitality in modern times. (See Brief of Appellant at 25 and n. 4 (citing 1927 case in which Oregon Supreme Court noted courts' declining reliance on presumption of payment doctrine)). The Bank then cites the state's current 'abandonment' statute, Ore. Rev. Stat. 98.308(1), as somehow impeaching the Oregon Supreme Court's observation.

Section 98.308 presumes that an account has been abandoned after five years in the absence of certain affirmative interaction by the customer. The Bank does not cite the statute as a basis for affirming the judgment in this case, nor can it. The statute was first enacted in 1983, and cannot be retroactively applied to an account opened twelve years

⁴ The Bank criticizes *Michie* and *C.J.S.* for citing only *Pagano* for that proposition. If the Bank is suggesting that the scholars writing those treatises conducted no independent analysis in determining whether *Pagano* was a fair statement of the law, such implication is unsupported.

earlier under prior law—particularly when the Passbook itself specifically advised customers that no such interaction was required.⁵

II. MR. HANDY’S EVIDENCE WAS SUFFICIENT TO REBUT THE PRESUMPTION AS A MATTER OF LAW IN ANY EVENT.

The Bank argues that (assuming a presumption of payment existed) the trial court correctly concluded that Mr. Handy’s evidence was not sufficient to overcome the presumption. The Bank argues that the trial court’s finding as to the sufficiency of plaintiff’s evidence is “not clearly erroneous,” and is dispositive of Mr. Handy’s claim.

In Oregon, “the presumption [of payment] is rebutted, or, to speak more accurately, *does not arise*, where there is affirmative proof, beyond that furnished by the specialty itself, that the debt has not been paid, or *where there are circumstances that sufficiently account for the delay of the creditor.*” *Beekman v. Hamlin*, 19 Or. 383, 25 P. 672, 672 (1891) (*Beekman II*) (emphasis added).

Even if a presumption might otherwise be applicable, the very nature of a passbook savings account – in which money is expected to remain for long periods of time and to do so is consistent with, rather than contrary to, societal norms – constitutes “circumstances [which] sufficiently account for the delay” By law, that fact, along with possession of the passbook, rebuts the presumption (or, stated otherwise, prevents it from arising). When state law provides that a certain type of evidence prevents a presumption from arising

⁵ Abandonment under the statute contemplates escheatment to the state. The trial court made a finding of fact that the Bank had not met its burden of proving that the money had escheated. The Bank challenges neither that finding nor the burden of proof on that issue.

and/or is sufficient to rebut it, it is error for a trial court to weigh evidence and conclude that more was required.

III. BECAUSE THE TRIAL COURT MISALLOCATED THE BURDEN OF PROOF, THE CASE MUST BE REMANDED FOR A NEW TRIAL. IN THE ALTERNATIVE, THE COURT MAY DIRECT ENTRY OF JUDGMENT FOR MR. HANDY BECAUSE THE BANK'S EVIDENCE WAS INSUFFICIENT TO ESTABLISH A *PRIMA FACIE* CASE ON ITS AFFIRMATIVE DEFENSE OF PAYMENT.

Ordinarily, improper allocation of the burden of proof requires remand to the finder of fact for consideration of the issues under the proper standard. *State v. Rynhart*, 2005 UT 84, ¶ 22, 125 P.3d 938; *State v. Ferguson*, 2005 UT App 144, 111 P.3d 820 (remanding for further proceedings for determination of whether appellant validly waived his right to counsel where trial court incorrectly shifted burden of proof); *Pledger v. Cox*, 626 P.2d 415, 417 (Utah 1981) (remanding for new trial where trial court incorrectly allocated burden of proof); see also p. 2, *supra*.

However, if this Court can determine from the record that the Bank's evidence below was insufficient to establish a *prima facie* case on its affirmative defense of payment, Mr. Handy is entitled to judgment as a matter of law. Whether a party's evidence is sufficient to make a *prima facie* case is a question of law. *Bair v. Axiom Design, L.L.C.*, 2001 UT 20, ¶ 13, 20 P.3d 388.

In this regard, the Bank spends 20 pages setting forth its best case. (Brief of Appellee, pp. 9-28.) Understandably, it does not attempt to rely on the trial court's actual findings of fact on the issue of payment. The only findings made by the court even

arguably supportive of the Bank's defense were two general statements, with no finding that the events had occurred with respect to Account 403111-8:

25. After the conversion to statement savings accounts, passbooks became worthless.

26. After the conversion to statement savings accounts, bank representatives told customers they could throw their passbooks away.

(R. 260).

The trial court stopped short of making fact findings as to what happened with respect to Account 403111-8, probably because none of the Bank's witnesses knew, and because it was not necessary in light of the court's erroneous belief that it was the plaintiff's burden to prove non-payment rather than the Bank's burden to prove payment.

Three bank witnesses testified at trial: David Martin (by deposition) (T. 72-89), Kate Tomassene (T. 90-126), and Denise Martens (T. 127-157). While the Bank's brief cites other portions of their testimony, certain basic admissions by these witnesses are dispositive of any contention that the Bank could present a *prima facie* case on its affirmative defense.

1. Neither Mr. Martin nor Ms. Tomassene ever worked at the bank that issued Account 403111-8. (T. 73, lines 4-7 (Martin); T. 272, p. 55, lines 14-20; T. 272, pp. 5-10, lines 21-23 (Tomassene).) None of the witnesses worked at any of the Bank's facilities until, at the earliest, nine years after the deposits at issue. (T. 90-91, lines 16-2 (Tomassene, 1980); T. 127-128, lines 17-1 (Martens, 1980); T. 274 at 4, lines 12-21 (Martin, 1989).)

2. All three of the Bank's witnesses (and counsel) admitted that they have no evidence of, nor do they know, what happened to Account 403111-8. (T. 96-99, lines 2-7, T. 108, lines 6-19 (Tomassene); T. 72-73, lines 11-13, T. 77-79, lines 24-24 (Martin); T. 154-156, lines 21-23 (Martens).)

These admissions extinguish any claim by the Bank that it could make a *prima facie* showing on its affirmative defense. Additionally, the following uncontroverted testimony puts in perspective the factual assertions in the Bank's brief.

3. Although the Bank speculates as to various scenarios under which the money could have been paid out without presentation of the passbook by Mr. Handy, its own witnesses testified that such scenarios would be unusual. According to the Bank's witnesses, for example, the name on the passbook usually matched the name on the authorized-signer card. If there was more than one authorized signer on the signature card, typically all of the names would be listed on the passbook itself. (T. 119-121, lines 8-2 (Tomassene); T. 135-140, lines 23-19 (Martens)). The fact that there was only one name on the passbook (Mr. Handy) indicates that it was not a joint account, and that there was no authorized signator other than Mr. Handy. (T. 139-140, lines 19-6 (Martens).)⁶

4. It was uncommon for customers to make withdrawals without passbooks. (T. 123, lines 13-17 (Tomassene).)

⁶ The Bank notes that one of the deposits shows the initials NOB, which it says means "no book." That is immaterial. Just as with modern statement accounts, no passbook was required to put money *in*, but only to take money *out*. The same is true today; generally, anyone can deposit money into an account, but withdrawals require proof of authority.

5. The Bank's witnesses did not know whether there was a monetary limit at the time on how much a customer could withdraw without a passbook. (T. 124-125, lines 3-8 (Tomassene).) (As the trial court noted from his own recollection, some banks would not let customers close out their accounts without their passbook.) (T. 124, lines 24-25.)

6. The Bank voluntarily elected to destroy its records from the period in question, even those reflecting the pivotal transition from passbook to statement accounts. (T. 9 lines 6-7, T. 9-10, lines 25-2 (counsel acknowledging destruction of records, and that Bank does not know "what happened to those funds" in Account 403111-8).)

7. Although the Bank's witnesses testified to a general understanding that notices or letters were sent to customers during the transition, all acknowledged that they did not know whether any such letter was sent with respect to Account 403111-8. Ms. Tomassene admitted that her knowledge was limited to seeing letters when customers brought them in, rather than any involvement in the process itself. (T. 93, lines 12-21.) Likewise, Mr. Martins testified that he was not "able to find any evidence of records that letters were sent to anyone regarding this account in question." (T. 77, lines 15-18.) Ms. Martens also did not know. (T. 154-155, lines 13-10.)

8. Ms. Tomassene testified that she recalled posters mentioning the transition being placed in the lobby of her branch. However, she never worked in the bank in question and did not know whether posters were placed there. (T. 272, p. 55, lines 14-20, 272 at 5-10, lines 21-23.) Nor could she remember what the posters said. (T. 92-93, lines 23-3.)

9. Ms. Tomassene acknowledged that, many times when she was a teller (beginning in 1980), she personally knew the customers at her branch. (T. 105, lines 16-22.) Nonetheless, the Bank made no effort to locate any of the individuals whose initials were reflected on the passbook deposits. (T. 79, lines 9-24 (Martin) (Bank's "go-to guy" when looking for information on an old account); T. 103, lines 2-8 (Tomassene).)

10. None of the Bank's witnesses offered testimony (nor could they) as to the Bank's practice regarding closing of accounts between 1971 and 1980.

Given the lack of any evidence from witnesses who were employed at the bank during the relevant time period, or who had any knowledge of what happened to Account 403111-8, the Bank failed as a matter of law to reach the threshold required to maintain its affirmative defense. Therefore, even though the trial court misallocated the burden of proof, remand is not necessary. Mr. Handy is entitled to a judgment on liability as a matter of law.

IV. THE BANK'S BELATED CHALLENGE TO MR. HANDY'S STATUS AS A PLAINTIFF IS WITHOUT MERIT.

According to the Bank, Mr. Handy "claims to own the account and monies therein" (Brief of Appellee, p. 32). Mr. Handy has consistently stated that he is seeking to preserve the funds for the benefit of his client, Mr. Anderson, whom he believes deposited the money. But the Bank's statement raises an obvious point: The passbook does have Mr. Handy's name on it and is in Mr. Handy's possession. There are only two possible plaintiffs in this claim: either Mr. Handy or the depositor. For the first time in

this case, the Bank now claims that Mr. Handy did not have a right to bring this action, because the money (and thus the claim) belong to the depositor rather than Mr. Handy.

There are several flaws in that argument. First, the Bank waived it. This Court addressed a similar argument in *Orlob v. Wasatch Medical Management*, 2005 UT App 430, ¶ 18, 124 P.2d 269. In that case, the defendant argued for the first time on appeal that the named plaintiff was improper because, having filed bankruptcy, any right of recovery belonged to the bankruptcy estate, not the plaintiff. This Court declined to address the issue. “In this case, the Jensens failed to raise the real-party-in-interest defense at all,” the court noted. “Rather, they conflated it with a standing challenge, which they did not raise until after the trial had concluded. . . . Failure to timely raise a real-party-in-interest defense operates as a waiver.” *Id.* (citation omitted).⁷

The Utah Supreme Court likewise rejected a belated challenge to the plaintiff’s authority to sue in *Smith v. Royer*, 26 Utah 2d 83, 485 P.2d 664 (1971). In that case, the court concluded that the plaintiff did not have a right to bring an action in his own name for recovery of chattels in replevin actions for the benefit of others. However, the court held that the issue had not been preserved: “[H]is standing as the real party in interest in the replevin action was not raised below, and therefore, it was waived.” See also *Lewis v. Porter*, 556 P.2d 496, 497 (Utah 1976) (“any objection to a defect of parties is waived, if not asserted by a party as provided in Rule 12(h)”).

⁷ “The real party in interest is the ‘person entitled under the substantive law to enforce the right sued upon and who generally, but not necessarily, benefits from the action’s final outcome.’” *Id.*

In any event, the Bank's premise is simply wrong. The trial court's characterization of the trust as "dry" (imposing no affirmative duties on the trustee) at its inception does not eliminate Mr. Handy's authority to preserve it, and the trial court did not so hold.

Regardless of whether the settlor expressly imposes duties, all trustees have inherent authority to preserve or recover the corpus of moneys entrusted to them. (Indeed, had Mr. Handy presented the passbook to the Bank in 1971, it is unlikely that the Bank would (or could) have refused to allow him to make a withdrawal.) To use a modern example, suppose an attorney places a retainer check in a trust account under his name for the payment of anticipated fees (basically an updated version of what happened in 1971). The money is subsequently embezzled by a bank employee. No one would argue that the lawyer cannot take action against the bank to recover the contents of his trust account, even though he will distribute the money to clients rather than keep it for himself. The Bank cites no cases suggesting otherwise.⁸

⁸ The Bank's argument also fails to take into account the fact that, although no *express* duties may have been imposed, various *implied* duties were. As the trial court noted in its Findings of Fact, the terms of the passbook required it to be presented in person for a withdrawal to be made. (R. 260 ¶ 16.) The only name on the passbook – and thus, the person who would be required to present it – was Mr. Handy. Consistent with this reasoning, Oregon law holds that an otherwise dry trust remains enforceable if the trust property has been delivered to the trustee. *Coston v. Portland Trust Co.*, 131 Or. 7, 278 P.2d 586 (1929); *see also Chicago Title & Trust Co. v. Mercantile Trust & Savings Bank*, 300 Ill.App. 329, 20 N.E.2d 992 (1939) (if conveyance would have to be made under name of trustee, trust is active).

An additional defect in the Bank's argument is that a dry trust does not thereby lose all effect. Under Oregon law, a dry trust remains valid between the trustor and trustee; it is only invalid as to creditors. *Coston v. Portland Trust Co.*, 131 Or. 7, 278 P. 586 (1929). Likewise, it is well settled law that, if an initial trust fails or is invalid, it transforms from an express trust into a resulting trust, under which the nominal trustee retains duties to the settlor and/or his heirs. *Bogert's Trusts and Trustees* (2006 supp.), §468; see also 96 *A.L.R.* 958, "Devolution of property under will giving property to one 'in trust' (or containing terms indicative of possible trust), where trust fails for uncertainty or there is failure to show intent to create trust" (2007 supp.); *Keller v. Rogstad*, 112 Idaho 484, 733 P.2d 705, 710 (1987) (void trust became a resulting trust toward which nominal trustee still had duties).

In any event, the Bank's argument overlooks the fact that a plaintiff need only have possession, not legal ownership, of an asset in order to seek its recovery from a third party. 18 *Am.Jur.2d* Conversion § 57. An agent of the owner is also a proper plaintiff in such a claim. *Id.* In this case, Mr. Handy was both: He had possession of the passbook and thereby (constructive) possession of the account. He also had an attorney-client (*i.e.*, agency) relationship with Mr. Anderson.

The Bank also fails to recognize that, even if Mr. Handy's duties at the inception were passive or dry, *i.e.*, that he was simply to return the remaining corpus to the depositor, that changed when Mr. Handy's client, the person he reasonably believes to have been the settlor, died shortly after the last deposit. At that point, Mr. Handy would have to exercise judgment in ascertaining heirs and entitlement to distribution, which are

undisputedly “active” duties. A trust that is invalid at its inception can become valid through later developments. See, e.g., *Sunquist v. Sunquist*, 639 P.2d 181, 186 (Utah 1981) (although trust initially failed for lack of corpus, valid trust came into existence later when sums were deposited).⁹

Finally, the Bank’s argument does not pass the common-sense test. The Bank is essentially arguing that, even if it cannot meet its burden of proof and would otherwise be required to repay the money in the account, it should still be able to keep it rather than allow Mr. Handy to distribute it to the persons he believes to be entitled to it. There is no policy consideration favoring such a result.

V. PLANTIFF ESTABLISHED A PRIMA FACIE CASE.

The Bank argues that, regardless of the presumption of payment, plaintiff’s evidence was insufficient to establish a *prima facie* case of entitlement to the contents of the savings account. “A prima facie case has been made when evidence has been received at trial that, in the absence of contrary evidence, would entitle to the party having the burden of proof to judgment as a matter of law.” *Bair*, 2001 UT 20, ¶ 14.

⁹ The Bank downplays the basis for Mr. Handy’s belief that Mr. Anderson was the depositor. Although it is not dispositive, Mr. Handy notes that his reasoning is basic logic: Mr. Anderson was the only person who ever suggested entrusting money to Mr. Handy in that fashion. He was in the midst of litigation and was generating significant legal fees. In particular, Mr. Anderson was in the midst of a dispute in the state of Oregon, where Mr. Handy had traveled at least once to meet with state officials. He died shortly after the last deposit in the account. (See T. 28-33, 40.) It is certainly a reasonable conclusion for Mr. Handy to draw and act upon.

The Bank's contention on this point is readily disposed of. The trial court recognized that, under Oregon law, possession of a passbook is sufficient to establish a *prima facie* case. (R. 150.) That conclusion is echoed by extensive case law and commentators, who uniformly observe that a passbook constitutes *prima facie* evidence as to the existence and status of a passbook savings account—indeed, that was the very purpose of a passbook. (See Brief of Appellant, pp. 15-16.)

CONCLUSION

For the reasons set forth above, appellant respectfully requests the Court to reverse the judgment of the trial court, and to remand with instructions to enter judgment in favor of the plaintiff on the issue of liability, with damages to be determined.

RESPECTFULLY SUBMITTED this 17th day of January, 2007.

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CERTIFICATE OF SERVICE

This is to certify that on the 17th day of January, 2007, two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANTS** were mailed, postage prepaid, to:

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